STATE OF NEW YORK COUNTY OF MONROE
CITY COURT CITY OF ROCHESTER

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

NIKKI G. CRAFT,
KATHLEEN F. REILLY,
DEBORAH A. SEYMOUR,
ELISE JO TOOLEY,
LYNN E. ZICARI,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF MONROE)

DAVID R. MOSS, being duly sworn, deposes and says that:

1. I am the attorney for the above-named defendants. I make this affidavit in support of the relief requested in the annexed notice of motion, and for such other and further relief as this Court may deem just and proper.

2. Unless otherwise stated, the facts stated herein are based on information and belief. The sources and grounds for affiant's belief are conversations held among affiant and the defendants, as well as the various and sundry papers filed in connection with this incident.

3. The said defendants were arrested and charged with the

offense of exposure of a person in violation of section 245.01 of the Penal Law in the City of Rochester on or about the 21st day of June, 1986. Copies of the informations are annexed hereto as "Exhibit A."

4. Arraignment of the defendants on the above-mentioned charge took place in this Court on the 23d day of June, 1986; to this date, no plea of guilty has been entered by said defendants, nor has a trial been commenced as to the aforementioned charge. The matter is currently scheduled for motions on July 8, 1986.

THE INFORMATIONS ARE DEFECTIVE PURSUANT TO SECTION 170.35 OF THE PENAL LAW IN THAT THE STATUTE DEFINING THE OFFENSE CHARGED IS UNCONSTITUTIONAL.

5. Section 170.30(a)(1) of the Criminal Procedure Law provides that a local criminal court may, upon motion of the defendant after arraignment, dismiss an information upon the ground that it is defective within the meaning of section 170.35 of the Criminal Procedure Law.

6. Section 170.35 of the Criminal Procedure Law states that an information is defective within the meaning of section 170.30(a)(1) of the Criminal Procedure Law when the statute defining the offense charged is unconstitutional or otherwise invalid.

7. Section 245.01 of the Penal Law provides that:

A person is guilty of exposure if he appears in a

public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

8. Section 245.01 of the Penal Law is unconstitutional, both on its face and as applied to defendants, in that:

(a) it violates the equal protection clause of the New York State Constitution, Article I, Section 11, which provides in pertinent part that: "No person shall be denied the equal protection of the laws of this State or any subdivision thereof." Section 245.01 of the Penal Law permits men to go top-free in public places, but forbids a similar freedom for women. This arbitrary, systematic course of discrimination against the defendants constitutes a denial of equal protection by favoring the actions of one class, males, over those of another, females.

(b) it violates the equal protection clause of the fourteenth amendment to the United States Constitution, which provides in pertinent part that: "No State shall . . . deny any person within its jurisdiction the equal protection of the laws." Section 245.01 of the Penal Law threatens women, but not men, with prosecution for baring their chests in a public place. Such a gender-based classification is permissible only where it furthers an important governmental interest. The State can claim no

important governmental interest to support section 245.01's gender-based classification.

(c) it is vague and overbroad in violation of the due process and free speech guarantees of the New York State Constitution, Article I, Sections 6 and 8. Article I, Section 6 of the New York State Constitution provides in part that: "No person shall be deprived of life, liberty or property without due process of law." This provision requires that citizens be given adequate warning of what a law requires before they can be required to conform their conduct to the dictates of the law. People v. New York Trap Roch Corp., 57 N.Y.2d 371. Section 245.01 of the Penal Law is unconstitutionally vague in that it fails to provide the defendant with sufficient notice to distinguish patently criminal from permissible behavior. In particular, the terms, "This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment" are insufficient to advise a person of acceptable conduct.

In addition, section 245.01 of the Penal Law is overbroad in that it has the chilling effect of prior restraint upon traditionally protected rights of speech and expression under Article I, Section 8 of the New York State Constitution. The statute exempts only live entertainment and breastfeeding from the class of proscribed criminal conduct, placing at risk traditionally protected conduct which may be political,

educational, scientific, religious, or artistic. The statute is also intrusive upon individual lifestyle, dress, exercise, and morals.

(d) it is vague and overbroad in violation of the first and fourteenth amendments to the United States Constitution. It is an essential element of due process of law that no person shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. United States v. Harris, 347 U.S. 612. Section 245.01 of the Penal Law is unconstitutionally vague in that it fails to provide the defendant with sufficient notice to distinguish patently criminal from permissible behavior. In particular, the terms "This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment" are insufficient to advise a person of acceptable conduct.

In addition, section 245.01 of the Penal Law is overbroad in that it has the chilling effect of prior restraint upon traditionally protected first amendment conduct. The statute exempts only live entertainment and breastfeeding from the class of proscribed criminal conduct. At risk is traditionally protected conduct which may be political, educational, religious, scientific, or artistic. The statute is also intrusive upon individual lifestyle, dress, exercise, and morals.

(e) it violates defendants' right to freedom of speech and freedom of expression under the New York State Constitution, Article I, Section 8, which provides in pertinent part that: "No law shall be passed to restrain or abridge liberty of speech or of the press." Section 245.01 of the Penal Law restrains the free dissemination of information, communication and ideas, and penalizes only women who bare their breasts, but not men, in the exercise of such liberty. Absent a compelling state interest to justify the restriction of such constitutionally protected rights, the statute is void.

(f) it violates defendants' right to freedom of speech and freedom of expression under the first and fourteenth amendments to the United States Constitution. Section 245.01 of the Penal Law restrains the free dissemination of information, communication and ideas, and penalizes only women who bare their breasts, but not men, in the exercise of such liberty. Absent a compelling state interest to justify the restriction of such constitutionally protected rights, the statute is void.

(g) it violates defendants' fundamental rights under the ninth amendment to the United States Constitution, which provides that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Section 245.01 of the Penal Law holds women criminally responsible for choosing to appear top-free in a public place. Lifestyle, dress, morals, exercise, and philosophy are

unenumerated expressions of fundamental human rights protected by the ninth amendment as retained by the people. Absent a compelling state interest in restricting such constitutionally protected rights, the statute is void.

WHEREFORE, the defendants request an order pursuant to sections 170.30(a)(1) and 170.35 of the Criminal Procedure Law dismissing the informations as defective or, in the alternative, a hearing.

REQUEST FOR BILL OF PARTICULARS.

9. With respect to that part of this motion which seeks a bill of particulars, I believe that I cannot adequately prepare or conduct a defense without being supplied the following information by the District Attorney:

(a) The exact date, time and place at which the crime is alleged to have occurred;

(b) The name of the alleged victim. People v. Langford, 16 N.Y.2d 32, 261 N.Y.S.2d 873 (1965);

(c) The specific acts allegedly performed by the defendants. People v. Iannove, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978); People v. Schubert, 140 Misc. 689, 251 N.Y.S. 390 (1931);

(d) The names of all prosecution witnesses. People v. Robinson, 75 Misc. 2d 477, 347 N.Y.S.2d 860.

(e) Whether the People intend to prove at trial that the

defendants acted as principals, accomplices or both.

SANDOVAL.

10. Under the authority of People v. Sandoval, 34 N.Y.2d 371, the defendants request that the District Attorney be precluded from asking any questions concerning the arrest record, conviction record or any prior immoral or vicious acts. Affiant believes that the presentation of such information in this case would greatly prejudice the defendants far beyond any probative value it could possibly have. In the alternative, defendants request a hearing as to any such evidence that the prosecution seeks to introduce at trial.

11. Under the authority of section 160.40 of the Criminal Procedure Law, the defendants request that the Court furnish them with copies of their division of criminal justice services reports so as to enable them to prepare for a Sandoval hearing.

BRADY MATERIALS.

12. With respect to that portion of this motion seeking delivery to the attorney for the defendants of all evidence favorable to the defendants, or evidence which may be favorable to them, affiant believes that the holding of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, requires the District Attorney to deliver all such potentially favorable evidence to the affiant, and the affiant requests that he do so.

13. Such information should include, but not be limited to:

(a) Any information to the effect that all or some of the evidence which may be utilized by the People at trial was illegally or improperly obtained or was obtained even partially as the result of the improper acquisition of some other evidence;

(b) Any evidence, information, testimony, transcripts, or statements indicating that the defendants herein did not commit the crime charged in the informations;

(c) Any evidence, information, testimony, transcripts, or statements indicating that any prospective prosecution witness on any occasion gave false, misleading or contradictory information regarding the charge at bar, or any related matters to persons involved in law enforcement or to their agents or informers;

(d) Any evidence, information, testimony, transcripts, or statements indicating that any prospective prosecution witnesses have given statements contradictory to one another;

(e) Any and all information, in whatever form available, supporting the position that the defendants did not commit the crime alleged in the information.

LEAVE TO MAKE FURTHER MOTIONS.

14. The defense has endeavored to encompass within this omnibus motion all possible pre-trial prayers for relief. Affiant

respectfully requests that this Court grant leave to apply for such further and future relief as may be deemed justified, should facts and circumstances not now within affiant's knowledge indicate that such additional motions are warranted.

WHEREFORE affiant respectfully prays that this Court grant the relief requested, as well as such other and further relief as this Court may deem just and proper.

David R. Moss

Subscribed and sworn to
before me this 8th
day of July, 1986

Betty M. Clelland
Notary Public

Betty M. Clelland, Notary Public
State of New York, County of Monroe
Term Expires ~~2/86~~ 11/30/88